86-1101

No. .....

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

—o—

McCABE'S FURNITURE, INC.,
Petitioner,

v.

LA-Z-BOY CHAIR CO.
Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

ALIOTO & ALIOTO
MERL BARNS
650 California Street
Twenty-Third Floor
San Francisco, CA 94108
(415) 434-2100

Attorneys for Petitioner, McCabe's Furniture, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

The jury found an agreement between the defendant manufacturer and a retail dealer in its products to terminate another such dealer constituted price fixing in violation of the Sherman Act. On appeal, the Court of Appeals found that the manufacturer's articulation of non-price reasons for terminating the lower pricing dealer precluded the jury's verdict. The question presented here is whether those non-price reasons can provide a proper basis for taking the decision away from the jury when the facts which gave rise to them were rebutted by the terminated dealer.

———o———

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioner, McCabe's Furniture, Inc. and respondent, La-Z-Boy Chair Co.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii, iv, v
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	7
INTRODUCTION	7
1. Prior Decisions of This Court Clearly Establish That the Acts Complained of Constituted Illegal Price Fixing	10
2. The Decision Below Represents an Extreme Procedural Error Which This Court Should Correct	14
3. In Direct Conflict With the Decision Below, At Least Three Other Courts of Appeals and One Decision Within the Eighth Circuit Have Left Disputed Issues of Fact Regarding a Manufacturer's Ostensible Non-Price Motives for Terminating a Dealer to be Decided by the Jury	16
4. The Court of Appeals Decision is Contrary to Congressional Intent	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases

Anderson v. City of Bessemer City, N.C., 105 S.Ct. 1504 (1985) 9, 16

Business Electronics v. Sharp Electronics Corp., 780 F.2d 1212, 1219 (5th Cir. 1986) 16

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980) 11

Dace v. A.C.F. Industries, Inc., 722 F.2d 374, 375 (8th Cir. 1983), modified *per curiam* 728 F.2d 976 (8th Cir. 1984) 14

Florida v. Rodriguez, 105 S.Ct. 308, 311 (1984) 16

Fragale and Sons Beverage Co. v. Dill, 760 F.2d 469, 474 (3rd Cir. 1985) 16, 17

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982) 9

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1360 (1986) 20

McDonnell Douglass Corporation v. Green, 411 U.S. 792 (1973) 7, 8, 18

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 7, 10, 12, 13, 14, 15, 18

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 16

National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978) 11

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) 17

Sedima, S.P.R.L. v. Imerex Co., Inc., 105 S.Ct. 3275, 3287 (1985) 18

TABLE OF AUTHORITIES—Continued

Page

Simpson v. Union Oil Co., 377 U.S. 13, 18 (1964) 11

United States v. General Motors Corp., 384 U.S. 127 (1966) 11

United States v. Parke, Davis and Co., 362 U.S. 29, 47 (1960) 11

United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949) 9

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) 11

Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 468-9 (8th Cir. 1985) 16

Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 549 (1977), 105 S.Ct. at 1512 9

Zidell Explorations, Inc. v. Conval International, Ltd., 719 F.2d 1465, 1471 (9th Cir. 1983) 15, 16, 17

STATUTES

15 U.S.C. § 1 ..... 2, 6

15 U.S.C. § 4 6

15 U.S.C. § 15 2

15 U.S.C. § 26 2

28 U.S.C. § 1254(1) 2

Federal Rule 50(b) 8, 15

Federal Rule 52 16

Sherman Act 17

Sherman Act, Section 1 15

Supreme Court Rule 17.1(a) 10

OTHER AUTHORITIES

L. Sullivan, *Handbook of the Law of Antitrust*, § 109 at 312 (1977) 17

Moore's Federal Practice, ¶ 50.07(2), Vol. 5A, pp. 50-76-82, 2d Ed., Matthew Bender 8

Pub. L., 99-180 at § 605, 99 Stat. 1136, 1169-70 (Dec. 13, 1985) 18, 19

Pub. L., § 605, 99-180 19

No. _____

In The
Supreme Court of the United States
October Term, 1986

McCABE'S FURNITURE, INC.,
Petitioner,

v.

LA-Z-BOY CHAIR CO.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, McCabe's Furniture, Inc., respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 13, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 798 F.2d 323 and appears in the appendix to this petition. The opinion of the District Court denying defendant's motion for judgment n.o.v., which has not been reported, also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1986. A timely Petition for Rehearing with Request for Rehearing *en banc* was denied on October 1, 1986. (The order appears in the appendix hereto.) This petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . .

STATEMENT

1. For approximately 15 years prior to February 1984, McCabe's Furniture, Inc. ("McCabe's"), a retail furniture store owned and operated by Fred McCabe, was an authorized retail seller of La-Z-Boy furniture products in Little Rock, Arkansas. As such, McCabe's purchased furniture from La-Z-Boy Chair Co. ("La-Z-Boy") and resold those products at retail. Mr. Cyrus Opferman has owned and operated La-Z-Boy Showcase Shoppes, which sell La-Z-Boy products exclusively, in the Little Rock area since 1978. In 1982, faced with declining sales, Mr. Opferman commenced complaining to La-Z-Boy representatives about the low prices charged by competing dealers, including McCabe's. Tr. 53*

On November 4, 1983, Paul Wright, La-Z-Boy's sales manager for the region including Arkansas, sent a memorandum to Wayne Jacobs, La-Z-Boy's Arkansas factory representative, stating that Mr. Opferman was getting ready to open a new Showcase Shoppe. Mr. Wright went on to state that:

> I want you to look at the distribution in Little Rock to make sure that the accounts there will allow Cy to make a decent profit on our product line.
>
> The two accounts that come to mind that have caused Cy problems in the past, are McCabe's Furniture and Crafton's Furniture.

PX 1

---

* "Tr." refers to the official transcript of the trial record below. "PX" refers to plaintiff's exhibits admitted into evidence below. "DX" refers to defendant's exhibits admitted into evidence below.

A carbon copy of this memorandum was sent to Patrick Norton, La-Z-Boy's Senior Vice-President for sales. On January 24, 1984 Mr. Wright's successor, Kurt Darrow, who had also received a copy of PX 1, made a personal "inspection" of the Little Rock retail area. Mr. Darrow was driven to McCabe's by Mr. Opferman and anonymously inspected the store for a three to five minute period (Tr. 62) during which he had no connversation with Mr. McCabe. Tr. 10 Mr. Darrow's report on that trip includes the following analysis with regard to McCabe's:

> This store is located in downtown Little Rock on 7th Street, and it is a very low end store with no carpeting, no vignetting and no accessorization whatsoever. The store has four La-Z-Boy's in the window and about 30 La-Z-Boy's in the back . . . I believe that this account is preventing us from developing other quality distribution in the Little Rock market and should be closed prior to moving the Showcase Shoppe.

DX 1, pp. 1-2

He concluded:

> After observing the Little Rock market, I believe we should terminate our relationship with McCabe's Furniture as they do not represent our marketing direction or our customers. We need to establish a new account in Little Rock, either Brandon's or Dillard's or both, which we cannot do with a low end account such as McCabe's on our books.

Id. at p. 3

This memorandum was transmitted to Mr. Norton who terminated La-Z-Boy's relationship with McCabe's in February of 1984. Mr. Norton testified that La-Z-Boy's lack of business in Little Rock and Mr. Darrow's report were decisive in his decision to terminate McCabe's. (Tr.

105) and further testified that the single-most significant fact in his decision to terminate McCabe's was the store's "lack of advertising of our product" and the lack of "display presenting it." Tr. 110

Yet, Mr. Darrow, in his market analysis, never discussed the lack of advertising, and each of the ostensibly important negative items which he did identify regarding McCabe's were all disputed at trial by competent testimony. Those points were that McCabe's (1) was a "very low-end store", (2) "with no carpeting", (3) "no vignetting", (4) "no accessorization" and (5) prevented La-Z-Boy from establishing a new account "such as Brandon's or Dillard's." With the exception of vignetting, which Mr. Norton did not even mention as a reason for termination, all four other facts were directly rebutted by McCabe's at trial.

Fred McCabe, President of McCabe's, testified that, based upon his 16 years in the furniture business, (Tr. 5), his store would be classified as falling in the middle of low-end and high-end furniture stores. Tr. 7. Indeed, Mr. Norton, who had never seen the McCabe's store until the day before trial, himself declined to characterize McCabe's as a low-end store. Tr. 106-07. Mr. McCabe further testified that the store did have carpeting and accessorization. Tr. 7-8. With regard to any ostensible impediment that McCabe's may have presented to establishing new accounts, as the Court of Appeals noted, 15 months after the McCabe's dealership was terminated, no new dealer had been obtained. (798 F.2d at 330) Moreover, pictures of both the McCabe's (Tr. 25) and Opferman (Tr. 64) stores were shown to the jury.

Prior to its termination, McCabe's had received no indication from La-Z-Boy that it was failing to meet any dealer criteria. Tr. 10. Upon receipt of written notification that it was being terminated as a La-Z-Boy dealer, Fred McCabe phoned Wayne Jacobs to ask why he had been terminated. Mr. McCabe testified that "the only reason [Jacobs] could figure out that they were terminating me is to give the La-Z-Boy Shoppe some relief." Tr. 12. When Opferman was informed in March of 1984 by Mr. Wright that McCabe's had been terminated, he was told "that problem had been taken care of." Tr. 64.

2. The lawsuit was tried before a jury which found that McCabe's termination had been the result of an illegal conspiracy between La-Z-Boy and Opferman carried out to fix or stabilize the retail prices of La-Z-Boy recliners in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The jury awarded McCabe's $30,000.00 in damages and, the District Court, pursuant to 15 U.S.C. §4, entered judgment for McCabe's for treble this amount plus attorneys' fees. After the District Court denied La-Z-Boy's motion for judgment n.o.v., La-Z-Boy appealed to the United States Court of Appeals for the Eighth Circuit.

3. The Eighth Circuit reversed the judgment below concluding that:

> . . . McCabe's produced sufficient evidence that La-Z-Boy and Opferman conspired, but failed to produce sufficient evidence that they conspired to maintain the price of La-Z-Boy products in the Little Rock market, the basis upon which McCabe's pleaded and presented its case.

798 F.2d at 325

REASONS FOR GRANTING THE PETITION

INTRODUCTION

This appeal raises a fundamental and critical issue of Federal Antitrust Law. The decision below, read fairly, stands for the proposition that in this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, (1984), the Court effectively adopted a legal standard precluding disputed issues of fact regarding a manufacturer's price related motives for terminating a dealer from being determined by the ultimate triers of fact. Nothing in the *Monsanto* opinion suggests that this Court intended such a drastic result.

The Court is thus presented in this case with an opportunity and, given the peculiar facts of this case, it may be a long time before a better opportunity is presented, to provide guidance on the appropriate allocation of the burden of proof between a terminating manufacturer and a dealer who challenges its termination under Section 1 of the Sherman Act. This Court has usefully availed itself of such opportunities in the past.

In *McDonnell Douglass Corporation v. Green,* 411 U.S. 792 (1973), this Court considered "the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* at 800 The *McDonnell Douglass* decision is instructive in analyzing this petition for two reasons. First, as the Court is well aware, that decision has provided useful and precise guidance for many comparable cases in the 13 years since it was decided, much as a review of this case could provide post-*Monsanto* evidentiary guidance for the lower courts in the coming years. Second, the basic jurisprudential logic which this

Court applied to a certain category of cases in *McDonnell Douglass,* logic which is equally applicable to the type of cases represented by this petition, shows glaringly the error which the Court of Appeals made below. In *McDonnell Douglass,* Mr. Justice Powell, speaking for the Court, noted that, after the plaintiff, in such a lawsuit, had made out a p*rima facie* case:

> The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection.

Id. at 802.

Significantly, for purposes of this case, he further stated that:

> . . . this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application.
>
> *Id.* at 807.

Such a fundamental allocation of the shifting burdens of proof in this case would have properly left the triers of fact to resolve the disputed issues of fact regarding La-Z-Boy's articulated reasons for terminating McCabe's.

In denying McCabe's this fundamental evidentiary right, the Court of Appeals unabashedly weighed the credibility of the evidence presented to the jury. Engaging in such an analysis runs directly contrary to the appropriate standard which should be applied to the review of a motion for judgment n.o.v. made under Federal 50(b) such as the one by the Court of Appeals below. (See, *Moore's Federal Practice,* ¶ 50.07(2), Vol. 5A, pp. 50-76-82 (2d Ed., Matthew Bender)) The importance to be accorded to the triers of fact in a lawsuit has recently been acknowledged articu-

lately by this Court in a case involving a District Court's findings of fact. We submit that those views apply with equal force to a jury's decision. In *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504 (1985) Mr. Justice White, in speaking for the Court, stated:

> If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it, even though convinced that, had it been sitting as a trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); See also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982)
>
> * * *
>
> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility . . . Duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost and diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated, in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout' on the road." *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977)
>
> 105 S.Ct. at 1512.

As we stated, exactly the same logic is applicable to the conclusions reached by a jury in a lawsuit such as this

one, and such a proper deference to their findings would have precluded the result which the Court of Appeals reached.

Beyond these elementary principles, there are four specific reasons why this Court should hear this case to consider the Court of Appeals' striking departure from established precedent. First, the decision conflicts with the prior decisions of this Court as to what proof is sufficient to establish unlawful price fixing. Second, the decision so far departs in its analytical treatment of factually disputed issues "as to call for an exercise of this Court's powers of supervision." Supreme Court Rule 17.1(a) Third, the decision is in direct conflict with decisions of at least three other Courts of Appeals as to the allocation of proof between a manufacturer and a dealer who alleges that it was terminated pursuant to a price-fixing conspiracy. Fourth, the decision runs counter to directly expressed congressional intent.

1. Prior Decisions of This Court Clearly Establish That the Acts Complained of Constituted Illegal Price Fixing.

Time and time and time again this Court has found that collusive activity which has the effect of stabilizing the price for products is illegal. The Eighth Circuit's decision ignores these prior holdings and, instead, focuses upon an inappropriate extrapolation of *dicta* contained in this Court's opinion in *Monsanto* to reach the erroneous conclusion that the conspiracy which it found existed did not constitute price fixing. The controlling pre-*Monsanto* decisions are well known to this Court and need only be highlighted.

Price fixing has been defined as "a combination formed for the purpose or with *the effect* of raising, depressing, fixing, pegging or *stabilizing* the price of a commodity . . . " *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (Emphasis Added) Put another way, " . . . an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face . . . " *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) More recently, the court has held that an agreement to eliminate credit terms was "tantamount to an *agreement to eliminate discounting* and thus [fell] squarely within the traditional per se rule against price fixing." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (Emphasis Added) As stated by the Court in *United States v. General Motors Corp.*, 384 U.S. 127 (1966):

> "The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. *We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by a combination or conspiracy, of a class of traders*, nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely."
>
> *Id.* at 148. (Emphasis Added)

The same logic, and much of the same language, has been cited in decisions of this Court involving vertical price restraints such as the one presented in this case. See, e.g., *Simpson v. Union Oil Co.*, 377 U.S. 13, 18 (1964); *United States v. Parke, Davis and Co.*, 362 U.S. 29, 47 (1960) There can be little doubt that McCabe's termination had the *effect* of stabilizing the retail price of La-Z-Boy recliners

in the Little Rock market for it removed from that market a competitor whose pricing had been giving Opferman "problems" before the termination. Indeed, a strong inference is created in the record that the *purpose* of the termination was to stabilize La-Z-Boy prices. Mr. Opferman testified that had McCabe's prices been the same as his, it "would not have seemed to exist to me" (Tr. 57) and that the Crafton's store was "quite a ways" (Tr. 63) from Little Rock. Thus, the McCabe's termination eliminated his only effective price competition in Little Rock. As the Court of Appeals decision noted:

> The evidence is uncontradicted that Opferman's complaints to La-Z-Boy about McCabe's included complaints about prices. In addition, in seeking to address Opferman's complaints, Wright instructed Jacobs to examine Little Rock distribution to insure Opferman's ability to "make a decent profit." There was evidence that prior to the termination, La-Z-Boy had urged McCabe's to raise prices, but significantly no evidence that it similarly had urged McCabe's to advertise, install carpeting in its showroom, or otherwise enhance the display of La-Z-Boy furniture, or provide service. Uncontradicted evidence also was presented that La-Z-Boy suggested resale prices . . . Finally, it is of some significance that despite La-Z-Boy's claim that the termination was necessary to obtain new upscale accounts in Little Rock, at the time of trial, 15 months after the termination, the McCabe's outlet had not been replaced.
>
> 798 F.2d at 329-30.

What distracted the Court of Appeals from a proper focus on this case was the panel's consideration of some *dicta* contained in this Court's *Monsanto* opinion. (798 F.2d at 329-30) Yet, it is clear that the *Monsanto* opinion has been carried far beyond its intended limits by the

Court of Appeals decision. What this Court clearly sought to require of a plaintiff in *Monsanto* was that it produce "evidence that tends to exclude the possibility that the manufacturer and non-terminated distributor were acting independently." 465 U.S. at 764. Specifically, the Court held that concert of action cannot be inferred solely from mere evidence of dealer pricing complaints followed by termination in response to those complaints, although the Court also acknowledged that evidence of such complaints did have some probative value on the issue of conspiracy. (*Id.* at p. 764, ftn. 8)

What the Court of Appeals did in its treatment of the *Monsanto* decision is to confuse the factually disputed evidence which was before it, and should have properly been left for the jury to make judgments upon, with the "highly ambiguous" description which this Court applied to mere termination following complaint evidence and properly characterized as insufficient. *Id.* at 763. Had McCabe's merely juxtaposed its price fixing evidence, against La-Z-Boy's non-price fixing evidence, then the Eighth Circuit's decision may have been more understandable. Yet, all of the factual bases which La-Z-Boy had advanced to support its contention that McCabe's was terminated for non-price reasons, as we have shown, were rebutted by McCabe's. This evidence was given *no* weight by the Eighth Circuit in reaching its conclusion that there was no proof that "La-Z-Boy's natural price concerns were more than a mere by-product of the central agreement to maintain legitimate non-price standards." (798 F.2d at 330)

Likewise, the Court of Appeals failed to give due weight to the factual elements which were common to

both *Monsanto* and this case, such as (1) suggestions by the manufacturer that the dealer in each case raise its prices (Compare 465 U.S. at 764-5 with 798 F.2d at 326), (2) post-termination explanations inferring price fixing motivations (Compare 465 U.S. at 766-7 with 798 F.2d at 327), and (3) the total lack of discussion prior to termination of "the distributorship criteria that were the alleged basis for the action" (465 U.S. at 767, Tr. 10). The proof in this case easily satisfied the standard set by this Court in *Monsanto* and its prior decisions defining price fixing.

2. The Decision Below Represents an Extreme Procedural Error Which This Court Should Correct.

In the opinion below, the Court of Appeals stated, in one fashion, what is the clearly correct standard in reviewing a District Court's ruling on a motion for judgment notwithstanding a jury verdict. As the Court stated, it should:

> (1) resolve direct factual conflicts in favor of the non-movant, (2) assume as true all facts supporting the non-movant which the evidence tends to prove, (3) give the non-movant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn. *Dace v. A.C.F. Industries, Inc.*, 722 F.2d 374, 375 (8th Cir. 1983), modified *per curiam* 728 F.2d 976 (8th Cir. 1984)
>
> 798 F. 2d at 327

Yet, with all due respect to the Court, what it did was resolve all conflicts in favor of La-Z-Boy, assume all facts supporting La-Z-Boy as true and give La-Z-Boy the benefit of all reasonable inferences. McCabe's presented re-

butting testimony on all of the factual bases for La-Z-Boy's contention that they had non-price motivations in terminating the McCabe's dealership. However, the Court of Appeals totally ignored this testimony. If this standard is allowed to stand in the Eighth Circuit and adopted in others, all that a manufacturer will be required to do in order to defeat the claim of a terminated dealer in a Sherman Act Section 1 case is to simply state, "we terminated the dealer for the following non-price reasons." The manufacturer could then chose any of a number of legally benign reasons which, under the logic of the decision below, the dealer would be precluded from effectively rebutting. Indeed, this Court explicitly rejected such inference selection urgings in *Monsanto*. (*See*, 465 U.S. at 767, ftn. 12, 14) The decision below represents patently unsound jurisprudence. As one Court of Appeals has sensibly noted:

> Corporate motives in modern antitrust cases are easy to manufacturer and hard to disprove. We have recognized that conventional indications of corporate purpose tend to drift away from the corporate actors actual intent at the time and instead miraculously converge around the corporate counsel's post-hoc determination of what that intent should have been. *Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1471 (9th Cir. 1983) (Citations Omitted)

This decision thus represents extreme procedural error in its application of the appropriate standards for Federal Rule 50(b). As Justice Stevens has previously noted:

> As a court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function

in federal litigation. *Florida v. Rodriguez*, 105 S.Ct. 308, 311 (1984) (Stevens, J. dissenting)

This Court has previously exercised its discretion to consider the appropriate standard to be applied to District Court findings of fact under Federal Rule 52 (See, *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504 (1985)) and the proper standard for a District Court to apply when invoking the abstention doctrine (*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)) The issue presented by this appeal, *i.e.* when a jury's inherent right and duty to resolve clearly disputed issues of fact may be taken away from it, is an equally, if not more, important area for which such error correction should be applied.

3. In Direct Conflict With the Decision Below, At Least Three Other Courts of Appeals and One Decision Within the Eighth Circuit Have Left Disputed Issues of Fact Regarding a Manufacturer's Ostensible Non-Price Motives for Terminating a Dealer to be Decided by the Jury.

The Eighth Circuit decision below directly conflicts with the decisions of three other circuits and one earlier decision within its own circuit. (See, *Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d. 1465, 1471 (9th Cir. 1983); *Fragale and Sons Beverage Co. v. Dill*, 760 F.2d. 469, 474 (3rd Cir. 1985); *Business Electronics v. Sharp Electronics Corp.*, 780 F.2d. 1212, 1219 (5th Cir. 1986) Cert. filed 6/21/85; *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d. 466, 468-9 (8th Cir. 1985).) In each of these cases, where the terminated dealer rebutted the non-price evidence presented by the manufacturer, the

Court of Appeals properly left for the jury the resolution of the disputed testimony and facts. As the 9th Circuit stated in *Zidell*, supra:

> In order to find that the supplier's primary motive is anticompetitive, the jury will be asked whether any of the supplier's asserted motives were an actual, bona fide pursuit of a legitimate business purpose, or were, instead, rationalizations for illegal conduct, afterthoughts possibly injected in response to legal advice after the fact, or were otherwise subsidiary to the supplier's anticompetitive intention. If the jury finds that the supplier's suggested legitimate motivations pale in significance by comparison to the illegal motive, the subsidiary motives will not detract from the supplier's "mutual commitment [with the complaining customer] to an anticompetitive course" which is the core of the classic conspiracy in restraint of trade. L. Sullivan, *Handbook of the Law of Antitrust*, § 109 at 312 (1977)
>
> Nor does a post hoc assessment concluding that the challenged conduct actually promoted competition justify the conduct. Conduct which is per se illegal is illegal without regard to its specific effect on competition. See, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed. 2d 545 (1958) When conduct is per se illegal, the end does not justify the means.

719 F.2d at 1471

As the Third Circuit has noted, if the disputed issues surrounding the reasons for the dealer's termination are resolved in favor of the dealer "this evidence of pretext . . . would disprove the likelihood of independent action." *Fragale and Sons*, supra, 760 F.2d at 474. The impact of this conflict is substantial for it extends to all businesses wherever located subject to the Sherman Act. As with

McDonnell Douglass and Title VII cases, a uniform definition of the proper allocation of the burden of proof between a manufacturer and dealer in a dealer termination case will serve to refine this Court's holding in *Monsanto* and thus enhance logical business planning throughout all chains of distribution. It will preclude the standards of the burden of proof required from shifting along with the locality in which a particular lawsuit happens to be lodged.

4. The Court of Appeals Decision is Contrary to Congressional Intent.

This Court has consistently acknowledged the substantial weight which it accords to Congressional intent. (*See*, e.g., *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3287 (1985).) Congress has enacted legislation that implicitly rejects the holding below. *See*, Pub. L. No., 99-180 at § 605, 99 Stat. 1136, 1169-70 (Dec. 13, 1985). This legislation was signed by the President. Prior to adopting this act into law, the House of Representatives issued House Report 99-399 on November 21, 1985. H.R. 99-399 strongly citicizes the "Vertical Restraint Guidelines" adopted by the Department of Justice in January of 1985. The report states, in part:

> Other "restatements" of the law exist in the guidelines that attempt to dilute or trivialize the generality of the per se rule against price fixing, both horizontal and vertical. *The division claims*, again without accompanying authorities, *that vertical price fixing is lawful so long as the agreement to fix prices* does not set "specific" resale prices and *is ancillary to one or more nonprice restraints* . . . Such a statement appears to reject or ignore any consideration of the effects of a restraint on price in determining whether there is a price fixing agreement
>
> * * *

> In all these respects the guidelines are *inconsistent with existing law* and are also demonstrably *unsound as a matter of public policy.*

(Emphasis Added)

This report led to Congressional passage of § 605 of Pub. L. 99-180 which reads in relevant part:

> Whereas such ["Vertical Restraint Guidelines" published by the Justice Department] are inconsistent with established antitrust law, as reflected in Supreme Court decisions and statements of Congressional intent, in maintaining that such policy guidelines do not treat vertical price fixing when, in fact, some provisions of such policy guidelines suggest that certain price fixing conspiracies are legal if such conspiracies are "limited" to restricting intrabrand competition; by blurring the distinction between price and nonprice restraints in analyzing a distribution containing both types of restraints, therefore qualifying the accepted rule that vertical price fixing in any context is illegal per se. . .;
>
> * * *
>
> . . . Now, therefore be it
>
> *Resolved*, That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in "Vertical Restraints Guidelines" . . .
>
> > are not an accurate expression of the Federal antitrust laws or Congressional intent with regard to the application of such laws to resale price maintainence and other vertical restraints of trade. . .

99 Stat. at 1169-70 (Emphasis Added in Part)

The opinion of the Court of Appeals below is obviously consistent with the "Vertical Restraints Guidelines"

which are rejected above in that it finds as a matter of law that La-Z-Boy's activities are legal because they were "ancillary to one or more non-price restraints." The opinion further blurs the "distinction between price and non-price restraints." The statement of Congressional intent expressed above is thus directly contrary to the decision of the Eighth Circuit. Congress acknowledged the reality from which the Eighth Circuit was distracted — the form or articulation of non-price restraints and motivations is not necessarily the same as the substance. The Eighth Circuit's decision has thus improperly deprived, as a matter of law, the jury, the body specifically charged with determining from competing evidence what the substance of a given case is, with the opportunity to do so.

———o———

CONCLUSION

This Court recently noted:

> . . . [C]utting price in order to increase business often is the very essence of competition.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1360 (1986)

Yet the Eighth Circuit's decision in this case goes to the essence of the legal policies which exist to encourage just such competition. As it presently stands, manufacturers in the Eighth Circuit can, in concert with one or more of their dealers, terminate other dealers who represent "the very essence of competition" with impunity, for all they need do is announce that they have terminated

such a dealer for non-price reasons. Under the decision below, such an announcement, which is not subject to the weighing of any rebuttal testimony from the terminated dealer, will entitle the manufacturer to summary judgment or directed verdict or judgment n.o.v. In other words, it will immunize him from acts which would otherwise constitute what this court has always recognized as illegal price fixing.

For the reasons stated above, a Writ of Certiorari should be issued to review the decision below.

DATED: December 29, 1986

Respectfully submitted,

By: MERL O. BARNS
ALIOTO & ALIOTO
650 California Street
Twenty-Third Floor
San Francisco, CA 94108
(415) 434-2100
Attorneys for Petitioner,
McCabe's Furniture, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 85-1825

McCabe's Furniture, Inc.,

Appellee,

v.

La-Z-Boy Chair Co.,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: January 16, 1986

Filed: August 13, 1986

Before McMILLIAN and JOHN R. GIBSON, Circuit Judges, and MURPHY,* District Judge.

---

*The HONORABLE DIANA E. MURPHY, United States District Judge for the District of Minnesota, sitting by designation.

JOHN R. GIBSON, Circuit Judge.

La-Z-Boy Chair Company, a manufacturer, appeals from a jury verdict awarding $90,000 in treble damage to McCabe's Furniture, a terminated dealer. The jury found that La-Z-Boy had conspired with Cyrus Opferman, owner

of a La-Z-Boy Showcase Shoppe competing with McCabe's, to maintain resale prices, a per se violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). La-Z-Boy appeals the district court's denial of its motion for judgment notwithstanding the verdict, arguing that McCabe's presented insufficient evidence of a vertical price maintenance conspiracy under the standard set forth by the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). La-Z-Boy also claims that the jury was not properly instructed and that the damage award was excessive. We conclude that McCabe's produced sufficient evidence that La-Z-Boy and Opferman conspired, but failed to produce sufficient evidence that they conspired to maintain the price of La-Z-Boy products in the Little Rock market, the basis upon which McCabe's pleaded and presented its case. Therefore, we reverse the judgment of the district court.

La-Z-Boy manufacturers furniture and distributes its products throughout the United States in two ways. Some of La-Z-Boy's sales are made through La-Z-Boy Showcase Shoppes, independently owned and operated retail outlets which exclusively sell La-Z-Boy products. Showcase Shoppe owners agree to advertise, to maintain an outlet with certain point-of-purchase amenities, and to offer repair service. In exchange for providing these services, Showcase Shoppe owners are licensed to use the La-Z-Boy name. La-Z-Boy also deals with department stores and retail furniture stores. These independent dealers carry a variety of furniture brands and make no contract to promote or service the La-Z-Boy line.

McCabe's Furniture is one of about a half-dozen independent retail furniture stores selling La-Z-Boy prod-

ucts in Little Rock, Arkansas. Until February 1984, when La-Z-Boy terminated the relationship, McCabe's had been dealing with La-Z-Boy for approximately 15 years. Fred McCabe, owner of McCabe's, testified that his marketing approach consistently had been to contain overhead costs and pass the savings to consumers in the form of low prices. McCabe testified that, despite his discounting, La-Z-Boy had never threatened termination, although it had occasionally urged him to raise his prices. La-Z-Boy concedes that it suggests retail prices to all its dealers, but claims to make no effort to police those prices. The evidence confirms that some Showcase Shoppes sell below La-Z-Boy's suggested retail price.

La-Z-Boy also distributes in Little Rock through a La-Z-Boy Showcase Shoppe, owned and operated by Cyrus Opferman. Operfman opened the first Little Rock Showcase Shoppe in 1978, and opened a second, in North Little Rock, in 1981. Until the termination, McCabe's Furniture and Opferman's Showcase Shoppes were competitors on the La-Z-Boy line.

In 1982, faced with a decline in sales, Opferman began complaining to La-Z-Boy representatives about competing dealers, principally McCabe's and Crafton's, another independent dealer some 18 miles outside Little Rock. Opferman testified that he complained that his competitors did not advertise the La-Z-Boy product, that their display of the product tarnished the La--Z-Boy image, and that they provided no repair service. He objected to the competitors' freeriding on his expenditures and efforts. He also complained that their prices were too low, and that their low prices were cutting into his sales. Opferman testified that

he voiced these complaints frequently and continually until he learned from La-Z-Boy of McCabe's termination. He added, however, that upon lodging these complaints, he had never received any kind of assent from La-Z-Boy to take action against McCabe's.

On November 4, 1983, Paul Wright, La-Z-Boy's sales manager for the region including Arkansas, wrote a memorandum to Wayne Jacobs, La-Z-Boy's Arkansas factory representative. The memo explained that Opferman would be closing both his Showcase Shoppes and relocating a new Shoppe in Little Rock, and that he deserved "to have every break possible to make this new Shoppe successful." Jacobs was instructed "to look carefully at the distribution in Little Rock to make sure that the accounts there will allow Cy to make a decent profit on our product line. The two accounts that come to mind that have caused Cy problems in the past," Wright's memo concluded, "are McCabe's Furniture and Crafton's Furniture." This memo also was sent to Patrick Norton, senior vice president of sales for La-Z-Boy, and Kurt Darrow, who later replaced Wright as sales manager for the region including Arkansas.

The decision to terminate McCabe's ultimately was made by Norton. Norton testified that when he joined La-Z-Boy in 1981, its sales throughout the nation were declining. He believed that the decline stemmed from La-Z-Boy's decreased ability to attract the consumer willing to spend the extra money to buy La-Z-Boy's comparatively expensive product. Norton reasoned that La-Z-Boy could most effectively improve its market position through nonprice competition with lower priced brands. He thus insti-

tuted a nationwide program to upgrade the retail promotion and service of La-Z-Boy furniture. This strategy, according to Norton, had succeeded in recapturing for La-Z-Boy a larger share of the furniture market.

Aware that despite nationwide sales growth, Little Rock sales continued to slip, Norton sent Kurt Darrow to inspect the Little Rock retail outlets. Darrow testified that he visited current and prospective La-Z-Boy dealers. Darrow was driven to McCabe's by Opferman, and anonymously inspected the store while Opferman waited outside. He testified, however, as did Opferman, that the two did not discuss the purpose of Darrow's visit. Darrow reported to Norton, in a memo dated of January 24, 1984, that McCabe's was a "very low end store" that was "preventing [La-Z-Boy] from developing other quality distribution in the Little Rock market." Darrow's memo further advised that McCabe's "should be closed prior to moving the Showcase Shoppe." Norton testified that based on Darrow's observations, and on his experience with the nationwide program, he decided that the best way to support Opferman's promotional and service efforts, and to enhance La-Z-Boy's attractiveness to prospective high-end independent retailers in Little Rock, was to terminate La-Z-Boy's dealings with McCabe's.

When McCabe was informed by letter from Norton of the termination, he phoned Wayne Jacobs to ask why he had been terminated. McCabe testified that "the only reason [Jacobs] could figure out that they were terminating me is to give the La-Z-Boy Shoppe some relief." Opferman testified that he did not learn of McCabe's termination until Paul Wright informed him by telephone in

March 1984. According to Opferman, Wright reported McCabe's termination by saying, " 'that problem had been taken care of.' " Finally, Darrow testified that although La-Z-Boy had sought to replace McCabe's with a more upscale retail outlet, an intention he expressed in the memo to Norton, and in a second memo several months later, at the time of trial, 15 months after the McCabe's dealership was terminated, no new dealer had been obtained.

After a one day trial, the jury returned a verdict against La-Z-Boy for $30,000. La-Z-Boy moved for a judgment notwithstanding the verdict on the ground that the evidence was not sufficient for a reasonable jury to find the existence of a vertical price conspiracy between La-Z-Boy and Opferman which resulted in McCabe's termination. The district court denied the motion and ordered the award trebled to $90,000. This appeal followed.

In reviewing the denial of a motion for judgment notwithstanding a jury verdict, we must view the evidence and all reasonable inferences in the light most favorable to the party who prevailed before the jury. *Pumps & Power Co. v. Southern States Industries*, 787 F.2d 1252, 1258 (8th Cir. 1986); *Giordano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied*, 403 U.S. 931 (1971). In so doing, we

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tends to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Dace v. AFC Industries, Inc., 722 F.2d 374, 375 (8th Cir. 1983), modified per curiam, 728 F.2d 976 (8th Cir. 1984). In addition, we observe that the Supreme Court has urged the lower courts, when adjudicating claims of insufficient evidence in antitrust cases, to evaluate the evidence as a whole, and to refrain from "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (emphasizing that in antitrust cases, motive and intent are important issues).

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a dealer termination case like this one, the Supreme Court set forth the evidentiary requirements to create a jury issue as to the existence of a vertical conspiracy. The Court held that proof that a manufacturer terminated plaintiff's dealership following, or even in response to, complaints by competing dealers, is legally insufficient to support a jury finding of concerted action. The Court reasoned that a manufacturer and dealer have many legitimate reasons for exchanging information about marketing activities; to impose liability because a manufacturer acted on information originating as a dealer complaint, or based on other "highly ambiguous evidence," would deter commercially useful communications. *Id.* at 763-64. The Court thus ruled that to get to the jury, "something more * * * is needed." *Id.* at 764. The plaintiff must present direct or circumstantial evidence that "reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (quoting

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* The Supreme Court recently emphasized this aspect of the *Monsanto* standard in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986), stating that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357.

The evidence is undisputed that from 1982, Opferman continually complained to La-Z-Boy that McCabe's various marketing practices were hurting his sales. It is further undisputed that following Opferman's complaints, La-Z-Boy terminated McCabe's dealership. Indeed, Wright's memorandum to Jacobs concerning the "problems" which McCabe's posed to Opferman, also sent to Norton and Darrow, and Norton's instruction to Darrow to investigate the Little Rock market, reasonably raise the possibility that the termination came in response to Opferman's complaints. This evidence alone, however, is insufficient to suport a jury finding of concerted action. The question is, is there "something more?" *Monsanto*, 465 U.S. at 764.

We believe the record reveals additional circumstances from which jurors reasonably could find that La-Z-Boy and Opferman shared the "conscious commitment to a common scheme," *id.*, required to satisfy the *Monsanto* standard. We are most impressed by the evidence that, after McCabe was terminated, Wright reported to Opferman that " 'the problem had been taken care of.' " A jury reasonably could conclude that this communica-

tion, combined with McCabe's testimony that "the only reason [Jacobs] could figure out that they were terminating me is to give the La-Z-Boy Shoppe some relief," tended to exclude the possibility that La-Z-Boy and Opferman were acting independently. *See id.* at 767 (relying on post-termination statements by manufacturer to conclude that plaintiff's termination was pursuant to an agreement between manufacturer and dealers). In addition, the fact that Darrow, upon arriving in Little Rock, was taken to McCabe's by Opferman, despite Darrow's and Opferman's testimony that they discussed nothing, is an event which a jury reasonably could view as evidence of concerted action. *See Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985) (evidence of an opportunity to conspire, while not alone enough to sustain an antitrust plaintiff's burden, is relevant) (citing *Edward J. Sweeney & Sons, Inc.*, 637 F.2d at 115).

We conclude that McCabe's presented sufficient evidence to support the jury's determination that La-Z-Boy and Opferman did not act independently. That the evidence of concerted action is primarily circumstantial does not undermine this conclusion: conspiracies are rarely evidenced by explicit agreements, and therefore may be proved by circumstantial evidence and the reasonable inferences that may be drawn therefrom. *See Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 743 (8th Cir. 1982); *see also Monsanto*, 465 U.S. at 764. Nor do we believe the jury's determination is based on "highly ambiguous evidence." *Monsanto*, 465 U.S. at 763. To the contrary, viewing the entire record in the light most favorable to the jury's verdict, that is, assuming as true all facts and inferences reasonably supported by the testi-

monial and documentary evidence, we believe that the jury finding of concerted action, pursuant to which McCabe's was terminated, was not unreasonable.

Our inquiry, however, cannot end here. To hold La-Z-Boy liable, the conspiracy it engaged in with Opferman must have been designed to achieve an illegal purpose. *Monsanto*, 465 U.S. at 764. With regard to illegality, antitrust law distinguishes conspiracies to maintain resale from conspiracies to impose vertical nonprice restrictions. *Id.* at 760-61. A concerted refusal to deal to maintain resale prices is illegal per se. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Concerted action to impose vertical nonprice restrictions, on the other hand, is subject to the rule of reason, illegal only if unreasonably restraining competition in the relevant market. *Continental TV Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Because of this distinction, as post-*Monsanto* authority recognizes, for a terminated dealer to prevail on its per se claim, the evidence must be sufficient for the jury to determine not merely that the manufacturer and nonterminated dealer conspired, but that they conspired to maintain resale prices. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1213, 1218 (5th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3795 (U.S. May 21, 1986) (No. 85-1910); *Terry's Floor Fashion, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 617 (4th Cir. 1985) (Winter, C.J., concurring). In this case, the distinction is crucial, since McCabe's neither pleaded a nonprice theory nor presented evidence that the agreement pursuant to which it was terminated unreasonably restrained competition.

As the Supreme Court observed, "While these distinctions in theory are reasonably clear, often they are difficult to apply in practice." *Monsanto,* 465 U.S. at 762. In the usual case, the conduct of the parties and the economic effect of that conduct is identical. *Id.* Whether the manufacturer and nonterminated dealer conspire to maintain prices, or to impose nonprice restraints, their conduct generally will manifest a hostility toward the terminated plaintiff. Similarly, the economic effect of either type of agreement often will be to reduce intraband competition and raise prices. The distinction emphasized in *Monsanto* between per se and rule of reason illegality, therefore, must turn ultimately on motive: on whether the manufacturer and nonterminated dealer conspired to terminate the plaintiff intending to affect price competition, or nonprice competition. When faced with conflicting evidence, the jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination.

La-Z-Boy presented substantial evidence that its concern with McCabe's stemmed not from its low prices, but from its failure to merchandize the product in a maner consistent with the high quality image La-Z-Boy sought to project. Opferman testified that his discontent with McCabe's and resulting complaints stemmed principally from its failure to advertise and service the La-Z-Boy product. Norton testified that McCabe's failure to advertise, properly display, and service La-Z-Boy furniture tarnished

the image which La-Z-Boy sought to foster on a national scale, and discouraged the targeted consumer from purchasing its product. Darrow's memorandum to Norton similarly expressed the concern that McCabe's "very low end store" would discourage higher quality retailers in Little Rock from carrying La-Z-Boy.

Evidence also was presented, however, to support McCabe's charge of a price maintenance consipracy. The evidence is uncontradicted that Opferman's complaints to La-Z-Boy about McCabe's included complaints about price. In addition, in seeking to address Opferman's complaints, Wright instructed Jacobs to examine Little Rock distribution to ensure Opferman's ability to "make a decent profit." There was evidence that prior to the termination, La-Z-Boy had urged McCabe's to raise prices, but significantly, no evidence that it similarly had urged McCabe's to advertise, install carpeting in its showroom or otherwise enhance the display of La-Z-Boy furniture, or provide service. Uncontradicted evidence also was presented that La-Z-Boy suggested resale prices. It is clear that La-Z-Boy did not strictly enforce its resale prices, and indeed, that even Opferman sold below the suggested price. Nonetheless, the practice might raise a possibility that La-Z-Boy sought, if not to fix, then at least to stabilize resale prices, which, if achieved through concerted action, is illegal per se. *United States v. General Motors Corp.*, 384 U.S. 127, 147 (1966); *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d at 1218. Finally, it is of some significance that despite La-Z-Boy's claim that the termination was necessary to obtain new upscale accounts in Little Rock, at the time of trial, 15 months after the termination, the McCabe's outlet had not been replaced.

In our view, this evidence viewed as a whole was not sufficient for the jury to reasonably find that La-Z-Boy and Opferman conspired to maintain resale prices. As the Supreme Court cautioned,

> it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer will often want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of a product, and will want to see that "free-riders" do not interfere. * * * Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the [law] allows.

Monsanto, 465 U.S. at 762-63 (citations omitted). The evidence demonstrates that La-Z-Boy and Opferman were motivated by a variety of factors, price among them. Indeed, the price concerns which emerge from the record cannot be ignored. There is no question that McCabe's prices were lower than Opferman's, that Opferman frequently complained about McCabe's prices, and that La-Z-Boy urged McCabe's to raise its prices. In addition, La-Za-Boy suggested resale prices to its dealers. Moreover, it can be reasonably inferred from Wright's memo to Jacobs that La-Z-Boy sought to ensure that Opferman would be able to succeed without meeting McCabe's lower prices. This evidence, however, proves no more than La-Z-Boy's "strongly felt concern," *id.* at 763, with its dealers' resale prices. The evidence which the jury could have relied upon to discard La-Z-Boy's nonprice justifications as pretextual is precisely the kind of "highly ambiguous evi-

dence," *id.* at 763, that Monsanto warns must not be considered by the jury. We do not believe it "tends to exclude the possibility that the manufacturer and nonterminated dealer," *id.* at 764, were motivated by nonprice concerns in reaching their agreement, as a result of which McCabe's suffered termination. At best it demonstrates "conduct as consistent with permissible competition as with illegal conspiracy." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. at 1357. There simply is no evidence that La-Z-Boy's natural price concerns were more than a mere byproduct of the central agreement to maintain legitimate nonprice standards. We thus conclude that the evidence of an agreement between La-Z-Boy and Opferman to maintain resale prices was not sufficient to satisfy the *Monsanto* test and place the resale price maintenance question properly within the province of the jury.

Therefore, we hold that the evidence was insufficient for reasonable jurors to find that La-Z-Boy engaged in a vertical price maintenance conspiracy pursuant to which McCabe's was terminated, in violation of section one of the Sherman Act. Because we so hold, we need not address La-Z-Boy's additional challenges to the jury instructions and damages award.

The denial by the district court of La-Z-Boy's motion for judgment notwithstanding the verdict is reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Filed U.S. District Court
Eastern District Arkansas June 27, 1985

Carl R. Brents, Clerk

/s/ By: Joy Hogue, Dep. Clerk

McCABE'S FURNITURE, INC., PLAINTIFF

v. LR-C-84-428

LA-Z-BOY CHAIR COMPANY DEFENDANT

ORDER

At the conclusion of a one-day trial in this action, the jury entered a verdict in favor of the plaintiff in the amount of $30,000.00 on its Sherman Act claim. 15 U.S.C. § 1. Defendant has moved alternatively for entry of judgment notwithstanding the verdict or a new trial attacking the sufficiency of the evidence, failure to give defendant's requested instruction No. 22 and the amount of the damages.

It is beyond dispute that after *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (U. S. March 20, 1984) an antitrust plaintiff such as McCabe's Furniture, Inc. must prove something more than termination of a distributor after complaint by nonterminated distributors in order to prevail. A plaintiff must show "a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. at 9 of slip op.

McCabe's met its burden herein. The evidence indicated that in addition to complaints by Cy Opferman about

McCabe's pricing, Opferman went with defendant's agent for an inspection of McCabe's and that shortly after this meeting McCabe was terminated as a distributor for defendant's product. One of defendant's agents (Jacobs) told McCabe's that it was terminated to give Opferman some relief. Evidence of a conspiracy is often difficult to present, but McCabe's presented sufficient circumstantial evidence from which the jury could infer a conspiracy between defendant and Opferman designed to achieve an unlawful objective.

Defendant's argument regarding its proffered instruction No. 22 is without merit. While the language of that instruction lifted from *Monsanto* serves as useful guidance to the Court in ruling upon sufficiency of the evidence questions in Sherman Act claims, this language needn't be a part of the instructions if the instructions as a whole adequately inform the jury of the law governing their deliberations. Such is the case herein. The jury was instructed that in order for plaintiff to prevail it must prove that Opferman and defendant conspired to fix prices. It was emphasized in the instructions that a corporation could not conspire with itself. Instruction No. 17 reminded the jury that "there must be at least two separate persons or corporations who have reached an agreement or understanding in order to find that a conspiracy was formed." This clearly ruled out the possibility that the jury could find for the plaintiff based on any unilateral actions of defendant.

The jury's verdict of $30,000.00 damages is not excessive. The jury reduced plaintiff's original request for damages. The reduction was apparently aimed at reach-

ing the necessary net profit figure by making the deductions suggested by defendant in its cross-examination and presentation of proof. (See Instruction No. 26)

The defendant's alternative motion for judgment notwithstanding the verdict or new trial is denied and judgment will be entered after trebling the $30,000.00 verdict. 15 U.S.C. § 15. Plaintiff's attorney should submit his request for a fee within ten (10) days of entry of judgment.

Dated this 27 day of June, 1985.

/s/ HENRY WOODS, U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 85-1825-EA
McCabe's Furniture, Inc.,

Appellee,

vs.

LA-Z-Boy Chair Company,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 1, 1986

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCCABE'S FURNITURE, INC.

Petitioner,

v.

LA-Z-BOY CHAIR CO.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

---

*LARRY J. SAYLOR
Miller, Canfield, Paddock and
STONE
2500 Comerica Building
Detroit, Michigan 48226
(313) 496-7686

and

PETER G. KUMPE
LEON HOLMES
WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

Attorneys for Respondent
La-Z-Boy Chair Co.

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
1. This Case Presents Solely a Question of the Sufficiency of the Evidence in a Unique Factual Context	6
2. Shifting of the Burden of Proof is Inappropriate in Antitrust Cases and the Legal Principle Advocated Was Not Presented to Either Court Below	12
3. This Case is an Inappropriate Vehicle to Revisit *Monsanto* Because it Turns on Unique Facts and it Comes Too Soon After the *Monsanto* Decision	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986), *petition for cert. filed*, No. 85-1910 (May 21, 1986)	12
Dace v. AFC Industries, Inc., 722 F.2d 374, 375 (8th Cir. 1983), modified *per curiam*, 728 F.2d 976 (8th Cir. 1984)	6
Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981))	7
Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985)	12
Kosak v. United States, 465 U.S. 848, 850 n.3 (1984)	13
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986)	2
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	1,12,13
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	2,5-9
Rogers v. Lodge, 458 U.S. 613, 628 n.10 (1982)	13
Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 468-9 (8th Cir. 1985)	12
Zidell Explorations, Inc. v. Conval International, Ltd., 719 F.2d 1465 (9th Cir. 1983)	11
OTHER AUTHORITIES:	
Pub. L. §605, 99-180	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1101

MCCABE'S FURNITURE, INC.,

Petitioner,

v.

LA-Z-BOY CHAIR CO.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent La-Z-Boy Chair Co. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case reported at 798 F.2d 323, for the reasons that:

(1) This case presents solely a question of sufficiency of the evidence in a unique factual context.

(2) Petitioner's argument for application of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is misplaced. Shifting of the bur-

den of proof is inappropriate in this type of case and the legal principle advocated was not presented to either court below.

(3) This case is an inappropriate vehicle to revisit *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), because it turns on unique facts and it comes too soon after the decisions in *Monsanto* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986).

STATEMENT OF THE CASE

La-Z-Boy is a furniture manufacturing company with its principal place of business in Michigan. It maintains a distribution system consisting of two types of dealers located throughout the United States. Part of La-Z-Boy's sales to consumers are made through what are known as La-Z-Boy Showcase Shoppes, which are independently owned and operated retail outlets devoted exclusively to marketing La-Z-Boy products. Showcase Shoppes enter into written contracts with La-Z-Boy whereby they agree, *inter alia*, to maintain a facility of a certain quality, to advertise the product, and to service it (Tr. 53, 95-96). La-Z-Boy also sells to independent retail furniture stores that are not devoted exclusively to La-Z-Boy products and do not enter into any kind of written contract (Tr. 96).

McCabe's is a retail furniture store in Little Rock, Arkansas. It markets a variety of furniture products manufactured by a variety of manufacturers. It had sold La-Z-Boy products for approximately fifteen years before La-Z-Boy discontinued selling to it in February, 1984 (Tr. 9). According to Fred McCabe, McCabe's

president and sole stockholder, La-Z-Boy and McCabe's had a cordial relationship throughout the fifteen years without any problems other than that on occasion a La-Z-Boy representative stated that McCabe's prices were too low and should be raised (Tr. 9). There was no testimony that La-Z-Boy made threats or took action to force McCabe's to raise its prices.

After it was terminated in February, 1984, McCabe's brought this action in the Eastern District of Arkansas, alleging tersely that La-Z-Boy and unnamed co-conspirators had conspired to fix prices, and that McCabe's was terminated as a part of this conspiracy.

As the facts developed during discovery and at trial, the sole alleged co-conspirator was Cyrus Opferman, who owns and operates a La-Z-Boy Showcase Shoppe in Little Rock, Arkansas (Tr. 52, 137).

Following a one-day trial at which McCabe's called only two witnesses, the jury returned a verdict in favor of McCabe's. La-Z-Boy appealed to the Eighth Circuit on three separate grounds: (1) that McCabe's failed to present sufficient evidence of a conspiracy to fix prices; (2) that the District Court erred in refusing to instruct the jury in accordance with *Monsanto*; and (3) that the award of damages was contrary to the evidence and excessive as a matter of law. The Eighth Circuit reversed and dismissed on the basis of insufficient evidence and therefore did not address the jury instruction and damages issues.

The issue at trial concerned the reasons for La-Z-Boy's termination of McCabe's. Fred McCabe, McCabe's president, admitted that he had no direct

knowledge of why he was terminated. Over La-Z-Boy's hearsay objection, McCabe was permitted to testify that when he asked a local La-Z-Boy salesman, "He said he didn't know, that the only reason he could think of that they were terminating me is to give the La-Z-Boy Shoppe some relief" (Tr. 11-12). McCabe also testified that his store was medium priced and not a low end store nor a high end store. He testified that the store had carpet in the dining room department, the TV department, and the front windows. The store had accessorization but not vignetting (Tr. 6-9).

McCabe's called Cyrus Opferman, the alleged co-conspirator, as an adverse witness. Opferman testified that he had complained to La-Z-Boy about McCabe's and another distributor, Crafton's, because they were, in Opferman's term, "freeloaders." Opferman testified that he was advertising the La-Z-Boy product extensively, but that McCabe's did not advertise the product at all. He also testified that he serviced the product, while McCabe's did not. In fact, in order to protect the La-Z-Boy reputation, he serviced McCabe's customers. Opferman testified that he displayed the product in proper settings, which McCabe's did not. He also testified that La-Z-Boy was not capturing an adequate share of the Little Rock market because of the lack of effort from other dealers besides himself (Tr. 55-58, 65-67).

Patrick Norton, who became vice president of sales for La-Z-Boy in 1981, testified in La-Z-Boy's case in chief. Norton testified that in 1981, La-Z-Boy's sales had been in decline for several years (Tr. 82). To reverse that trend, Norton instituted a new marketing system for the 202 largest metropolitan trade areas,

which included Little Rock. In those places, La-Z-Boy wanted one showcase shoppe plus distribution through what Norton called "quality or first-line general furniture store operations" (Tr. 88). That program has been successful and has reversed La-Z-Boy's decline (Tr. 89).

Despite the fact that La-Z-Boy's sales increased from 1981 to 1983 nationally, its sales continued to decline in Little Rock (Tr. 92). Mr. Norton made the determination that McCabe's marketing philosophy did not coincide with La-Z-Boy's marketing philosophy and therefore terminated McCabe's in February, 1984 (Tr. 107).

SUMMARY OF ARGUMENT

This case is not worthy of Supreme Court review because it presents only factual issues. The Eighth Circuit's opinion follows the governing Supreme Court case, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and applies the proper standard of review for the sufficiency of the evidence. There is no conflict between the Eighth Circuit opinion in this case and opinions in other circuits. Petitioner's argument that the Court should adopt a new standard for the shifting of the burden of proof is inapposite to this type of case and was not submitted to either court below. This Court should not revisit *Monsanto*, if at all, until the Courts of Appeal have had the opportunity to apply and evolve its standards in a broad range of cases.

ARGUMENT

1. This Case Presents Solely a Question of the Sufficiency of the Evidence in a Unique Factual Context.

Contrary to McCabe's assertions, this appeal raises no important issues of law; the decision below turned solely on the sufficiency of the evidence. The Eighth Circuit did not depart from this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), nor did that court adopt a new legal standard precluding the trier of fact from determining disputed issues. There is no extreme procedural error to be corrected, nor does the court's opinion conflict with the decisions of other circuits.

The Eighth Circuit properly held that in reviewing the denial of a motion for judgment notwithstanding a jury verdict, it must view the evidence and all reasonable inferences in the light most favorable to the party who prevailed before the jury. In so doing, the court recognized that it was required to:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting -the nonmovant which the evidence tends to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

798 F.2d at 327, quoting *Dace v. AFC Industries, Inc.*, 722 F.2d 374, 375 (8th Cir. 1983), modified *per curiam*, 728 F.2d 976 (8th Cir. 1984).

The Eighth Circuit also recognized the controlling authority of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The court discussed that decision

at great length and used that decision as the standard for reviewing the sufficiency of the evidence. As the court noted, the exchange of information between a manufacturer and a distributor does not automatically make the manufacturer's subsequent termination of a competing distributor part of a conspiracy:

> In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a dealer termination case like this one, the Supreme Court set forth the evidentiary requirements to create a jury issue as to the existence of a vertical conspiracy. The Court held that proof that a manufacturer terminated plaintiff's dealership following, or even in response to, complaints by competing dealers, is legally insufficient to support a jury finding of concerted action. The Court reasoned that a manufacturer and dealer have many legitimate reasons for exchanging information about marketing activities; to impose liability because a manufacturer acted on information originating as a dealer complaint, or based on other "highly ambiguous evidence," would deter commercially useful communications. *Id.* at 763-64. The Court thus ruled that to get to the jury, "something more * * * is needed." *Id.* at 764. The plaintiff must present direct or circumstantial evidence that "reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert.*

> *denied*, 451 U.S. 911 (1981)). "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* The Supreme Court recently emphasized this aspect of the *Monsanto* standard in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), stating that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357.

798 F.2d at 327-28.

The Eighth Circuit articulated the relationship between concerted action to maintain resale prices, which is unlawful per se, and concerted action to impose vertical nonprice restrictions, which is subject to the rule of reason. This distinction, the court emphasized, is critical in evaluating the evidence:

> Because of this distinction, as post-*Monsanto* authority recognizes, for a terminated dealer to prevail on its per se claim, the evidence must be sufficient for the jury to determine not merely that the manufacturer and nonterminated dealer conspired, but that they conspired to maintain resale prices. * * * In this case, the distinction is crucial, since McCabe's neither pleaded a nonprice theory nor presented evidence that the agreement pursuant to which it was terminated unreasonably restrained competition.
>
> * * *
>
> When faced with conflicting evidence, the

> jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination.

798 F.2d at 329 (citations omitted).

Finally, the Eighth Circuit observed that this Court in *Monsanto* held that a manufacturer's concern with resale prices does not automatically make concerted action per se unlawful:

> [I]t is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer will often want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of a product, and will want to see that "free-riders" do not interfere. * * * Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the [law] allows.

Monsanto, 465 U.S. at 762-63 (citations omitted), *quoted in* 798 F.2d at 330.

McCabe's takes no issue with the Eighth Circuit's articulation of the law. It argues only that in its view,

the evidence of a conspiracy to fix prices was sufficient to get to the jury, whereas the Eighth Circuit disagreed. It is hardly surprising that a litigant would disagree with an appellate court which set aside a jury verdict in the litigant's favor. That understandable dissatisfaction, however, does not create a case appropriate for review by this Court.

McCabe's argument for certiorari is wholly predicated upon a biased, incomplete, and inaccurate rendition of the evidence presented at trial. Although McCabe's contends that there was a genuine factual dispute concerning whether La-Z-Boy had legitimate reasons for terminating it, in fact there was no genuine dispute, and the evidence is overwhelming that La-Z-Boy had ample nonprice justification for its decision.

McCabe's presented only two witnesses. One of those was the alleged co-conspirator, Cyrus Opferman. Opferman testified that he had, indeed, complained about McCabe's being a freeloader. He testified that McCabe's provided no advertising for La-Z-Boy products, nor did McCabe's service the La-Z-Boy products it sold. Opferman was forced to "carry the ball" for McCabe's in this regard. Furthermore, Opferman testified that he complained because McCabe's did not properly display the product. He also testified that because of the lack of effort from McCabe's, La-Z-Boy was not penetrating the Little Rock market.

All of this testimony was presented in McCabe's case by a witness called by McCabe's. None of it was rebutted. Fred McCabe did not testify that he ever advertised La-Z-Boy products, nor did he testify that he ever serviced any of the La-Z-Boy products he

sold. Likewise, he never testified as to the manner in which he displayed the La-Z-Boy products.

Patrick Norton, vice president of sales for La-Z-Boy, testified that beginning in 1981, La-Z-Boy initiated a nationwide program of terminating distributors that were not of the sort to attract customers who could pay the comparatively high prices charged for La-Z-Boy's high quality products. The effort had been made to begin distributing La-Z-Boy products through distributors that were of the highest quality in each area. This program had succeeded in reversing La-Z-Boy's declining sales. In the Little Rock market, however, La-Z-Boy's sales had continued to decline. Norton testified that McCabe's was not a high quality store and not in a high quality location, that McCabe's did not advertise the product and did not properly display it. All of this, again, was undisputed. Furthermore, photographs of McCabe's store were introduced into evidence and available for the Eighth Circuit to review.

In light of the undisputed fact that McCabe's did not advertise the product, did not service the product, did not display it properly and, in Opferman's term, was a "freeloader," the Eighth Circuit appropriately concluded that the evidence that the termination was part of a conspiracy to fix prices was "highly ambiguous" and insufficient under *Monsanto* to support a finding of per se illegality.

There is no conflict between the Eighth Circuit's opinion in this case and the two post-*Monsanto* decisions of other circuits cited by McCabe's.[1] The Fifth

[1] McCabe's inexplicably also cites a pre-*Monsanto* decision, *Zidell Explorations, Inc. v. Conval International, Ltd.*, 719 F.2d

Circuit in *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986), *petition for cert. filed*, No. 85-1910 (May 21, 1986), reversed a judgment for the plaintiff dealer on grounds virtually identical to the reasoning of the Eighth Circuit below. The Third Circuit's decision in *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d Cir. 1985), involved a motion for summary judgment, not the sufficiency of evidence presented at trial. McCabe's also contends that the decision in this case is inconsistent with another Eighth Circuit decision, *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 468-9 (8th Cir. 1985). McCabe's made this same argument in its petition for rehearing *en banc* to the Eighth Circuit, but the Eighth Circuit unanimously denied the petition.

Nor is the decision below contrary to congressional intent. Neither the "Vertical Restraint Guidelines" nor Pub. L. 605, 99-180, deal with the sufficiency of evidence. Since the sufficiency of the evidence is the only issue presented here, there is no conflict between the Eighth Circuit decision and congressional intent.

2. Shifting of the Burden of Proof is Inappropriate in Antitrust Cases and the Legal Principle Advocated Was Not Presented to Either Court Below.

Petitioner's argument with respect to the burden of proof was not presented either to the District Court or to the Eighth Circuit; nor was the case upon which petitioner relies, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), even cited by petitioner to either court below. An issue not presented below may not

---

1465 (9th Cir. 1983), which applied a standard rejected by this Court in *Monsanto*.

ordinarily be raised before this Court. *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982).

Further, *McDonnell Douglas* is inapposite. In that case, this Court pronounced standards for proof of a prima facie case of race or sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and held that once such proof has been presented, the burden of proof shifts to the defendant. Such a shift in the burden of proof has never been applied to antitrust cases.

Furthermore, application of such a procedure to dealer termination cases would *sub silentio* overrule *Monsanto*. This Court in *Monsanto* chose the more stringent among competing standards for prima facie proof of a per se Section 1 Sherman Act violation. It expressly rejected the more liberal price complaint standard applied by the Seventh Circuit. The Eighth Circuit determined that this case does not meet the applicable standard. It made no procedural error. To reverse the Eighth Circuit by application of *McDonnell Douglas* would be to abandon *Monsanto*.

3. This Case is an Inappropriate Vehicle to Revisit Monsanto Because it Turns on Unique Facts and it Comes Too Soon After the Monsanto Decision.

Monsanto is a major contribution to the antitrust jurisprudence, imposing standards for trial courts to winnow among dealer termination cases. Before this Court revisits that precedent, it should have the benefit of a wide variety of adjudications under its standards. The instant case not only comes too soon for this Court to realize the benefits of this process, but it also presents only a fact weighing issue. It does

not present a suitable backdrop for a contribution to antitrust jurisprudence.

CONCLUSION

As this case is presented by the petitioner, it presents only an issue concerning the sufficiency of the evidence. This is not an appropriate case for Supreme Court review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LARRY J. SAYLOR, Esq.
2500 Comerica Building
Detroit, Michigan 48226
(313) 496-7686

PETER G. KUMPE, Esq.
LEON HOLMES, Esq.
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

Attorneys for Respondent
La-Z-Boy Chair Co.

Of Counsel:

MILLER, CANFIELD, PADDOCK
and STONE

WRIGHT, LINDSEY & JENNINGS